Supreme Court, U.S.
FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SHEILA CONKLE,

Petitioner,

vs.

COURT OF APPEALS FOR THE NINTH CIRCUIT,

Respondent,

SULINNA JEONG, dba LAIRD'S FOOD MARKET, BALDWIN JEONG, JADELIN ENTERPRISES, a Corporation, dba LAIRD'S FOOD MARKET, UNITED FOOD AND COMMERCIAL WORKERS' UNION, LOCAL 1179 AFL-CIO

Real Parties in Interest

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. Questions presented for review.

1. Where both union leaders and the employer each have strong personal dislike for a union member, because of her activities during a strike, does the "suggestion" by a union Business Representative to that employer of a facially neutral work restriction, which that Represenative knows the member can't meet, constitute "arbitrary" action in breach of the union's duty of fair representation ("DFR") to that member?

2. Did the Court of Appeals, in affirming the Judgment of the District Court, violate this Court's dual requirements on Summary Judgment that reviewers refrain from weighing the evidence and draw all reasonable inferences in favor of the responding party by ignoring completely Petitioner's "smoking gun" evidence in deciding that the UNION did not act arbitrarily in breach of its DFR? Petitioner's evidence was a statement as fact by a Business Representative to the union's Executive Committee (made a full day before negotiations were even commenced with the employer involved) that a member would not be hired back, because of restrictions in her lifting to 25 pounds.

3. Did the Court of Appeals, in affirming decisions of the District Court, which artificially restricted Petitioner's discovery on pendent state claims and then, over her objections, granted Summary Judgment against her for lack of sufficient evidence, violate Petitioner's constitutional rights to a jury trial on the issues and this Court's earlier directions that State claims be dismissed (rather than ruled upon) in these circumstances?

B. A list of all parties to this proceeding.

Petitioner, SHEILA CONKLE ("CONKLE");

Respondent, COURT OF APPEALS FOR THE NINTH CIRCIUT;

Real Party, SULINNA JEONG ("SULINNA"), dba LAIRD'S FOOD MARKET ("LAIRD'S");

Real Party, JADELIN ENTERPRISES, a Corporation ("JADELIN"), dba LAIRD'S FOOD MARKET;

Real Party, BALDWIN JEONG ("BALDWIN"); and

Real Party, UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1179 ("LOCAL 1179" or the "UNION").

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3. A hearing on this Petition should also open up the Summary Judgment that was granted in favor of the Employers on the Section 301 claims against them, since the latter was granted solely because of failure of the DFR claims against the Union herein. 22

4. In affirming the decision of the District Court to artificially restrict CONKLE's discovery on pendent state tort claims against the Employers and then to grant Summary Judgment against her for lack of sufficient evidence on their claims, the Court of Appeals misapplies recent decisions of this Court and other Courts of Appeal as to the quantum of evidence which a responding party must present to create triable issues. And, ruling at all violated past directives of this Court to dismiss the State claims in such circumstances. 22

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E. Concise statement of the basis for jurisdiction in this Court.

1. The Ninth Circuit filed its Opinion sustaining the Judgments below in this matter on December 27, 1995.

2. CONKLE moved for rehearing/hearing en Banc on January 10, 1996. The Ninth Circuit denied these motions on February 7, 1996.

3. So far as CONKLE is aware, there is no cross-petition for certiorari.

4. The statutory provision conferring on this Court jurisdiction to review the judgment below on a Writ of Certiorari is 28 USC, Section 1254(1), Rule 10 of the Rules of the Supreme Court of the United States also provides that authority.

F. The Constitutional provisions, statutes, ordinances and regulations involved in the case, set out verbatim with appropriate citation.

1. "In suits of common law, where the value in controversy shall exceed Twenty dollars ($20), the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the

United States, than according to the rules of the common law." Seventh Amendment to the United States Constitution.

2. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 USC, Section 185.

G. A concise statement of the case setting out the facts material to consideration of the questions presented.

1. Basis for federal jurisdiction.

CONKLE brought this matter under Section 301 of the Labor Management Relations Act (29 USC, Section 185) ("LMRA") to recover damages for her wrongful discharge by defendants and respondents SULINNA, JADELIN and BALDWIN (collectively the "Employers"), under Federal Common Law against the UNION for breach of its duty of fair representation ("DFR") and under State Law against the Employers for slander and interference with prospective economic advantage. The District Court had jurisdiction under 29 USC, Section 185 and Federal Common Law. The District Court entered its Judgment ("Judgment") on May 3, 1994, granting Summary Judgment to the employers and the UNION (collectively the "Respondents") on all claims under the Complaint. CONKLE appealed on June 1, 1994, and the Court of Appeals had jurisdiction under 28 USC, Section 1291.

2. Facts which support this Petition.

From at least 1976 on, LAIRD'S had operated as a Union store, and the retail clerks had been represented by the UNION. Up until the latter part of 1991, CONKLE had been a clerk at LAIRD'S and had continuously been a member of the UNION for more than fifteen (15) years. On November 9, 1991, CONKLE injured her back doing special heavy lifting, which was thrust on her as a result of reclassification of her job (from "liquor clerk" to "grocery clerk"). No other female grocery clerk in the store had to do, the heavy lifting that CONKLE had to do[1] and it seemed this was "punishment" for the UNION's having gratuitously "reclassified" her job. She was off for a year with the injury, drawing Workers' Compensation. In December, 1992, the Independent Medical Examiner in her case agreed to allow her to return to work with a 25 pound weight lifting limit. At this point, the UNION was, under a three (3) year, Collective Bargaining Agreement (the "CBA"), which had been entered into only on February 19, 1992. SULINNA, then owner of LAIRD'S, agreed to allow CONKLE to come

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1. From the time that CONKLE first went to work at LAIRD'S, the store had a longstanding policy, which allowed women to decide what items they could and/or could not lift. There were special employees, who lifted nothing at all (e.g., SULINNA). Others lifted very little (e.g., JADE JEONG ("JADE"), SULINNA's daughter, who lifted only what she could easily with one hand). Though this policy was unwritten, females regularly followed it, refusing to lift items, which they considered too heavy. They were never disciplined for their refusals. Indeed, whenever a woman grocery clerk found an item too heavy to lift, she'd call for assistance (normally a male would do this), and help would be provided.

back with this restriction. CONKLE informed SANDRA TWOHY ("TWOHY"), Business Representative for the UNION, of this understanding. TWOHY talked to SULINNA and reported to CONKLE that the latter had "sold" the business to JADELIN, a corporation wholly owned by her children, (JADE and BALDWIN), and intended to lay off all UNION employees by December 28, 1992. LOCAL 1179 believed the "sale" was, in effect, a repudiation of the CBA.

The UNION filed a grievance under the CBA and encouraged CONKLE and others to strike against LAIRD'S. CONKLE was a leader in this effort and, as a result, attracted the enmity of the JEONG family. And, she was the one, who persuaded her fellow strikers to "hang in there", despite actions by the UNION hierarchy to undermine their efforts. In connection with the latter, she exposed half-truths and foot-dragging by the leaders of LOCAL 1179, and this, in turn, brought on the intense dislike of the hierarchy of the UNION. Unfortunately for her, this UNION had a long history of "rewarding their friends and punishing their enemies". And by the end of the strike, CONKLE was clearly an "enemy" as far as PHIL CARNEY ("CARNEY"), the then President of LOCAL 1179, TWOHY and the other officers were concerned.

By March 8, 1992, CONKLE's efforts and those of her fellow strikers forced BALDWIN to agree to begin negotiations for a CBA covering JADELIN (in addition to the proprietorship operated by SULINNA, which was already covered by a CBA). Before negotiations began, TWOHY told CONKLE that BALDWIN wanted everyone

back but her, and she added she wished she didn't have to even negotiate on CONKLE's behalf.[2]

On March 9, 1992, a full day before LOCAL 1179 was to open negotiations on the CBA, TWOHY told the UNION Executive Board that CONKLE wouldn't be coming back, because she'd been out on disability and could not lift more than 25 pounds.[3]

There was no way TWOHY could know that to be a fact, unless the UNION hierarchy had independently reached their own conclusion on that particular point. This is so, because there is no evidence that there was any discussion between the UNION leaders and BALDWIN or any other of the Employers about this issue until after the new CBA was negotiated and, in fact, signed.

Negotiations between CARNEY, TWOHY and BALDWIN (for the Employers) began on March 10 at the UNION Hall. BALDWIN did initially ask about not taking CONKLE back, but, when the UNION refused his request to exclude her because of her activities during the strike, BALDWIN simply agreed to whatever terms the UNION proposed. So, the "negotiations" were completed and a formal CBA was signed on that single day. After the CBA was finalized, TWOHY for the first time, (and then CARNEY) told BALDWIN to require CONKLE to provide

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[2] Indeed, on March 10, when TWOHY told CONKLE and others that the strike was over, she couldn't resist a final dig at CONKLE, saying "negotiations would have gone a lot quicker without you".

[3] This fact was described by CONKLE in both her Briefs and on oral argument as the "smoking gun" in this case.

a "full medical release", before he let her come back to work. They knew full well that CONKLE couldn't get such a release for unlimited lifting from her doctors, and this was simply a "device" to bar her from returning.

On March 11, 1992, BALDWIN followed their direction and told CONKLE he wanted a "full medical release" from her, before she could come back. She asked for a written description of the duties he had in mind for her, and he listed, among other things, "lifting boxes up to 50 lbs., stocking shelves, walking or standing for periods of about 2 hours at a time". CONKLE called TWOHY about these new requirements, and she told her "BALDWIN can require you to do whatever work he called for". A later call to CARNEY elicited the comment "that stupid kid . . sure, he'll modify your job". CONKLE sought an appropriate medical release from Dr. SLAUSON, her physician, who opined she could do any work, which did not require prolonged bending, stooping or squatting, but she could not lift articles weighing more than 25 lbs. With these "restrictions", CONKLE could easily have done the work of a grocery checker at LAIRD'S.[4]

But, based on Dr. SLAUSON's report, BALDWIN (and after further consultation with the UNION about it) refused to rehire CONKLE. She then wrote the UNION, asking for its help, and so did her Workers' Compensation Lawyer. On March 25, CONKLE called asking for CARNEY, and TWOHY returned the call, saying "it's up to you now . . . we're washing our hands of it".

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4. See footnote 1 above.

CONKLE immediately sought other employment and there was considerable interest from Safeway for her to take a booth person's job (duties included balancing cash drawers, getting change for checkers, etc.). She was certainly qualified, and the Store Manager told her she was all but hired. He sent her to the local HR office for employment formalities (e.g., drug test, etc.). After she gave LAIRD'S as a reference, she never heard back on the job. She called the Safeway HR person, and the latter gave CONKLE a patently false reason for not putting her on. Becoming suspicious, she had 2 separate people call and talk to LAIRD'S seeking employment verification. BALDWIN told both of them seriously derogatory (and untrue) facts about CONKLE. Though she has sought employment, she has not since been able to locate work in the grocery industry, where she worked for most of her adult life. She is entitled on these facts, to her day in Court on these claims.

H. A direct and concise argument amplifying the reasons relied on for allowance of the Writ.

1. By ignoring the fact that the UNION knew CONKLE couldn't lift more than 25 pounds when Union Officers "suggested" to the Employers that they require her to provide a full medical release before returning to work, the Opinion misapplies the standard for "arbitrariness" established by this Court and as applied by other Courts of Appeal.

In holding that the UNION did not act arbitrarily toward CONKLE, when it gratuitously

"suggested" to the Employers that she obtain a "full medical release" before she could come back to work at LAIRD'S, the Opinion overlooks the critical fact that the UNION knew CONKLE couldn't comply with that condition, when they suggested it. The Opinion passes this "suggestion" off as merely affording an honest and full response to an inquiry by the Employers (Opinion ("Op."), (73 F.3d at 916) (Appendix ("A"), page 34 ("A-34")). But, this concept ignores the admonition of Airline Pilots Assn. v. O'Neill, 499 U.S. 65, 74, 113 L.Ed.2d 511, 111 S.Ct. 1127 (1991) that the DFR is like a duty owed by fiduciaries to their beneficiaries (e.g., as the duty owed by a trustee to trust beneficiaries or an attorney to a client). What trustee could, with impunity make a "suggestion" like the one the UNION did here, knowing at the time it was made, that it would severely and adversely affect a beneficiary of that trust? The Opinion also conflicts with Aguinga v. United Food & Com. Workers Inter. (CA 10, 1993) 933 F.2d 1453, 1471, cert den. 114 S.Ct. 880 (1993), which found a union's conduct to be arbitrary (within the definition given in Airline Pilots Assn. v. O'Neill, supra), where it failed to protect the members' interests (i.e., allowed employer to close a union plant knowing it intended to reopen as non-union and failed to take steps to grieve this action), bartered away the members' means of protecting themselves (i.e., entered into side letters releasing all the members' claims, concealed those letters, filed unfair labor charges and privately withdrew them) and left the members without representation. To the same effect is Bennett v. Local Union No. 66 (CA 7, 1992) 958 F.2d 1429, 1437, which upheld a jury verdict finding the union

acted arbitrarily and in breach of DFR, where the union President signed plaintiff employee's Union card on the 31st day of her employment (after a 30 day probation period), welcomed her into the union, invited her to come to monthly union meetings (she did attend one), assured her that the probationary period for some new employees would not be extended to 60 days, and then agreed with the employer to a retroactive extension of the probationary period for the plaintiff, during which time she was fired.

At the very least, CONKLE's evidence raised triable issues of material fact on the issue of the arbitrary actions of the UNION in breach of the DFR. In early December, 1991, TWOHY learned from CONKLE that she would be returning to work with a doctor imposed weight limit (for lifting) of 25 pounds. Then followed her stormy relations with the UNION hierarchy as a result of her exposures of UNION shortcomings during the strike, and TWOHY's statement to CONKLE before negotiations began that she would prefer not to negotiate for her at all. Add to this, TWOHY's statement to the Executive Board of the UNION on the day before negotiations were to begin with BALDWIN for the Employers that CONKLE wouldn't be back, because she had been out on disability and could not lift more than 25 pounds and you see why this is the "smoking gun" here. The timing of this statement clearly reflects an intent by the UNION hierarchy to phase CONKLE "out" at LAIRD'S, as soon as they got the chance to do so. When BALDWIN capitulated completely the next day, signing the CBA that LOCAL 1179 proffered to him, TWOHY saw her chance and first brought up the "full

medical release" issue with him. And, he took the ball and ran with it. The UNION's involvement didn't end there, it having continued to advise BALDWIN on this release (i.e., on whether CONKLE's release was adequate, etc.), until CONKLE was finally forced and forever from any possibility of re-employment at LAIRD'S. Together, these facts create a triable issue as to the "arbitrariness" of the UNION's conduct toward CONKLE, which requires a hearing on this Petition.

Though Early v. Eastern Transfer (CA 1, 1983) 699 F.2d 522, 557, cert den 464 U.S. 824 (1983), cited by the Opinion (Op. 916) (A-34), does permit a union representative to decline to put forth an interpretation of a CBA, which he and the union reasonably believe is incorrect, that is not authority for the proposition that a representative can gratuitously speak to an employer knowing that doing so will directly and adversely affect the job prospects of a member. Indeed, the Court totally failed to consider the very reasonable option available to LOCAL 1179's representatives of simply refusing to provide advice at all in this situation. By speaking, when TWOHY should have required BALDWIN to seek his own counsel, the UNION breached the DFR, which necessitates a hearing on this Petition.

2. The Opinion ignores both the requirement that on Summary Judgment all inferences are to be drawn in favor of the responding party and Petitioner's crucial "smoking gun" evidence showing the "suggeted" work

> restriction was meerly a "device" to exclude her from employment, which together create triable issues, and, therefore, it con-flicts with decisions of this Court and other Courts of Appeal.

The Court of Appeal is required to review de novo the grant of a Summary Judgment below. Cal. Arch. Bldg. Prod. v. Franciscan Ceramics (CA9, 1987) 818 F.2d 1466, 1468. Under Rule 56(c) of the Federal Rules of Civil Procedure ("FRCP"), Summary Judgment is appropriate, only if the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of Law. Where there has been full discovery in the case, to withstand a motion for Summary Judgment, the non-moving party must show that there are genuine factual issues that properly can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The substantive law is what determines, which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing Law will properly preclude entry of Summary Judgment. id.

In ruling on Summary Judgment motions, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter. His role is to determine, only whether there is a triable issue for trial. id. Thus, the Anderson Court stated id. (at 477 U.S. 252):

> "Progressing to the specific facts in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'".

The evidence of the non-moving party must be believed, and all justifiable inferences are to be drawn in his favor. (id., 477 U.S. at 255). The Anderson Court went out of its way to state that its holding does not denigrate the role of the jury

and by no means authorizes trial by affidavits. On the contrary, credibility determinations, the weighing of the evidence and drawing of legitimate inferences from the facts are all jury functions - not those of the judge. (id., 477 U.S. 255).

The Opinion, here, insofar as it finds that CONKLE provided "no evidence" to show bad faith or personal animus toward her by the UNION motivated the "suggestion" of the rehiring condition as to lifting up to 50 pounds, overlooks critical points of fact that show, with other facts, that the UNION hierarchy had decided before the negotiations for the CBA even began that CONKLE wasn't going to go back to work at LAIRD'S and the requirement of a "full medical release" was just a device to accomplish that end.

The DFR includes, among other things, the obligation on the part of the UNION not to engage in conduct toward a member, which is in bad faith. Vaca v. Sipes 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). To determine, if bad faith is involved, the Ninth Circuit itself will look at the totality of the circumstances. Banks v. Bethlehem Steel Corp. (CA 9, 1989) 870 F.2d 1438, 1444. The Court there, reviewing the evidence produced by the plaintiff as to which the Court found to create a triable issue of fact, outlined the following (870 F.2d at 1445):

> "Standing alone, Banks' (the claimant's)* disagreement with Hughes (the Union Rep.)* over the handling of his grievance would not constitute evidence of bad faith. Nor would a

> bare allegation of Hughes' ulterior motive withstand a motion for summary judgment. Viewed together with Banks' other allegations and evidence in the record regarding disagreement within the Union, the merits of his claim, the small amount acquired in settlement by Hughes, and Hughes' refusal to accept the assistance of Banks' attorney, Banks' allegations take on more weight. Because of the posture of this case, we must view this evidence in the light most favorable to Banks and consider whether there is a genuine issue of material fact. Banks has raised a genuine issue of material fact as to whether Hughes exercised his discretion with 'complete good faith and honesty of purpose,' Huffman, 345 U.S. at 338, 73 S. Ct. at 686[5]. Therefore, the issue should not be resolved at the summary Judgment stage. (added*)

To the same effect is Bennett v. Local Union No. 66, (CA7, 1989), supra, which, after reviewing the possible conflicting interpretations of the circumstantial evidence, upheld a Court Judgment finding the Union acted in a deceitful scheme (i.e., for internal union political reasons) to deprive the member of her protected status under the CBA as a bad faith breach of the DFR. Aguinga v. United Food & Chemical Workers Intl., (CA10, 1993) supra, is another example, where all

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[5] Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

circumstances were considered to uphold a jury verdict finding a bad faith breach of the DFR.

The circumstances here, taken together, are certainly sufficient to create a triable issue on the bad faith of the UNION in "suggesting" that BALDWIN require CONKLE to get a "full medical release" before allowing her to return to work. There was deep seated animosity by TWOHY and CARNEY toward CONKLE that stemmed from her conduct of the strike, which labeled the latter an "enemy". There is also a long history of retaliation by the particular UNION against "enemies" of the LOCAL 1179 leadership (i.e., "reward your friends and punish your enemies"). TWOHY knew full well (from early December, 1991, on at least) that CONKLE was limited to lifting no more than 25 pounds by her Workers' Compensation doctors. And, TWOHY told the UNION Executive Board members on March 9, the day before discussions began with BALDWIN for a new CBA, that CONKLE wouldn't be coming back because of her inability to lift more than 25 pounds. There was no way for her to know that, unless there had been discussions on this subject among the UNION hierarchy (because, by the record, BALDWIN had no discussions about this aspect until the next day, after the new CBA was fully negotiated and signed). Only after the CBA was fully signed BALDWIN asked, in effect, "whether he had to leave a place open for CONKLE". The only reasonable option available to the UNION, consistent with its fiduciary relationship to CONKLE was to "duck that issue" and have BALDWIN get that answer from his own counsel. Notwithstanding that reality, TWOHY "suggested" that he

require CONKLE to get a "full medical release", before she'd be allowed to return to work (knowing full well, at that point, that she could not get such). The UNION continued to advise BALDWIN on the merits of the medical release that CONKLE did obtain and what to do about this. The only reasonable inference from this evidence that the "suggested" full medical release was merely a "device" employed by TWOHY and CARNEY to eliminate CONKLE, the "enemy", from employment at LAIRD'S. There is, thus, a further triable issue, which necessitates hearing and/or by this Court on this Petition.

3. A hearing on this Petition should also open the Summary Judgment that was granted in favor of the Employers on the Section 301 claims against them, since the latter was granted solely because of failure of the DFR claims against the Union.

The Opinion (Op. 916-17) (A-36 and 37) correctly points out that where the employee is unable to make out a DFR case against the UNION, the action against the employer is similarly barred. Schlacter-Jones v. General Tel. (CA 9, 1991) 936 F.2d 435, 442-43. That was the only basis for sustaining the Judgment in favor of the Employers (Op. 916-17) (A-37). It follows, therefore, that, if the Judgment for the UNION is reversed, so also must be that for the Employers. This aspect should also be considered on hearing of this Petition.

4. In affirming the decision of the District Court to artificially restrict

> CONKLE's discovery on pendent state tort claims against the Employers and then to grant Summary Judgment against her for lack of sufficient evidence on their claims, the Court of Appeals misapplies recent decisions of this Court and other Courts of Appeal, as to the quantum of evidence, which a responding party must present to create tangible issues. And, ruling at all, violated past directives of this Court to dismiss the State claims in such circumstances.

This affirmance basically cuts off CONKLE's "due process" rights and conflicts with decisions of this Court and of other Circuits. The Ninth Circuit decisions applying the 7th Amendment concepts mandate that a lesser standard (e.g., "some evidence") be enough to raise triable issues of fact, where discovery has been circumscribed by the Trial Court. Perez v. Curcio (CA 9, 1988) 841 F.2d 255, 258. Sischo-Nownejad v. Merced Community College Dist. (CA 9, 1991) 934 F.2d 1104, 1110-13.

This Court in Anderson v. Liberty Lobby Inc., 477 US 242, 248-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) went out of its way to emphasize that the "new rules" on Summary Judgment annunciated therein do not denigrate the role of the jury and by no means authorize trial by affidavit. On the contrary, credibility determinations, the weighing of evidence and the drawing of legitimate interference from the facts are all jury functions - not those

of the Judge. (id, 477 US at 255). And, these new "rules" governing Summary Judgment apply only, where the non-moving party has had ample opportunity for discovery. (id, 477 US at 250, fn 5, and 477 US at 257). Celotex v. Catrett, 477 US 317, 326, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986), is to the same effect.

There is a serious issue as to CONKLE's inability to make discovery here. The District Court's oral order at Status Conference in November, 1993, limited the parties to depositions of plaintiff, SULINNA, BALDWIN, CARNEY, TWOHY, and UNION Executive Board Members BARBARA CARPENTER, KAREN ELWOOD and SANDY KAZA. CONKLE disclosed some 27 other persons, including BRUCE WILLIAMS and CHRIS LEWIS (Safeway employees involved in interviewing CONKLE, when she sought alternate employment, after BALDWIN refused to rehire her after the strike). She sought leave to depose, at least, the Safeway witnesses by specific requests in her Memorandum in Response to the employers' Summary Judgment Motion, by her Declaration in Support thereof, by the Declaration of her attorney and by her Statement of Uncontroverted and Controverted Facts and, by declaration, identified the relevant information and issues as to which their evidence would apply. These requests were supported by specific reference to Rule 56(f) of the FRCP. This is sufficient to invoke the exercise of discretion by the District Court. Garrett v. City and County of San Francisco (CA 9, 1987) 818 F.2d 1515, 1518. Refusal to either allow depositions or continue the Summary Judgment hearing at

least, gives rise to a lesser standard on CONKLE's part to produce "some evidence" as sufficient to raise triable issues.

Notwithstanding these authorities, the Opinion found CONKLE had offered no evidence of an expected job at SAFEWAY or elsewhere or of any conversation between JEONG and any prospective employer (Op. 918) (A-40). Under California Law, the injured party in an intentional interference case is not even required to mention by name the third party. Identification in some manner is sufficient. Ramona Mannor Convalescent Hospital v. Care Enterprises (1986) 177 C.A.3d 1120, 1133, 255 C.R. 120. CONKLE went far beyond these requirements by identifying Safeway, and, by declaration, showed the potential job (as booth person) and her Manager's statement that she all but had the job. The fact that this "evaporated", after she gave LAIRD'S as a reference and called Safeway about it, receiving a patently false reason from the HR person for not putting her on creates an inference that BALDWIN had something to do with this result. And, CONKLE even went beyond that by having two (2) separate people call LAIRD'S seeking "employment verification". BALDWIN told both seriously derogatory (and untrue) facts about CONKLE. Together, these facts create a fair inference that BALDWIN told much the same tale to Safeway HR, when he was approached by them to verify CONKLE's employment. That certainly qualifies as "some evidence" to raise triable issues of fact to defeat the Summary Judgment here and to support a hearing on this Petition.

In any event, it has long been the rule that, where a Federal Court dismisses Federal claims on the merits by Summary Judgment, it should refuse to exercise pendent

jurisdiction (to determine State Law issues as an incident to adjudication of a federal question) over non-federal claims. United Mine Workers v. Gibbs, 383 US 715, 726-27, 16 LEd 2d 218, 86 S.Ct. 1130 (1966). This principle is based both on concepts of comity and to promote justice between the parties by procuring for them a surer-footed reading of applicable law. Merry v. Coast Community College District (1979) 97 C.A.3d 214, 22-23, 158 C.R. 603.

In addition to these ordinary considerations, the District Court (and Court of Appeals) here had special reasons to dismiss and/or require dismissal, rather than rule on, CONKLE's state claims. As above, the District Court allowed only limited discovery on critical issues and was, therefore, on shaky ground in applying the Anderson and Celotex principles to even the Federal claims. Equally, the fact that CONKLE requested Summary Judgment be deferred (to permit depositions of, among others, the SAFEWAY personnel and was entitled to that delay under Rule 56(f) of the FRCP), to not only deny the request for additional discovery, but also then rule adversely on CONKLE's State Law claims for lack of evidence flies in the face of both the Constitutional Guaranties of the right to jury trial of the 7th Amendment and the directions of this Court as set forth in Gibbs. For this additional reason, hearing should be allowed on this important constitutional issue.

CONCLUSION

WHEREFORE, CONKLE respectfully prays that this Court issue its Writ of Certiorari and set this matter forthwith for hearing.

DATED: May 3, 1996.

HOOY & HOOY
A Professional Law Corporation

By _____
WILLIAM J. HOOY, Attorney for
Petitioner SHEILA CONKLE

APPENDIX - 1

Sheila CONKLE, Plaintiff,

v.

Sulinna JEONG, dba Laird's Food Market, Baldwin Jeong, Jadelin Enterprises, a corporation, dba Laird's Food Market, United Food and Commercial Workers' Union, Local 1179 AFL-CIO, Defendants.

No. C-93-2443 VRW.
Cite as 853 F. Supp. 1160 (N.D.Cal. 1994)
United States District Court, N.D. California.
May 2, 1994.

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS ON ALL CLAIMS FOR RELIEF.
WALKER, District Judge.

Plaintiff Sheila Conkle ("Conkle") began working at Laird's Market ("Laird's") on September 30, 1976. After completing her (1162) probationary period at Laird's, she became a member of the United Food and Commercial Workers Union, Local 1179 ("Local 1179"). Conkle's principal job duties were to work in the liquor store section of Laird's, which included checking groceries for customers.

In October, 1992, Conkle experienced a "quick and fleeting" pain in her back while lifting something at work. She reported the pain to Sulinna Jeong, on of the owners of Laird's, who told her to file any workers compensation claim within three days. Conkle decided not to file a claim at that time because she believed that she would be able to handle her job without further problems.

On November 5, 1991, Conkle was lifting a case of liquor from the floor to a shelf above her head when she suddenly felt a pain "like somebody had taken an ice pick and shoved it in [her] lower back." As a result of her injury, Conkle was unable to walk without experiencing pain in her back. Her supervisor, Baldwin Jeong, released her to go see her family practitioner, Dr. Dana Slauson. Dr. Slauson allowed Conkle to return to work on condition that she refrain from lifting.

On November 8, 1991, Sulinna Jeong decided that Conkle should not continue to work if she was unable to lift. Conkle did not complain to any union representative about the fact that Sulinna Jeong was not permitting her to work. November 8, 1991, was the last day that Conkle actually "worked" for Laird's.

On December 9, 1992, Conkle received a call from her worker's compensation lawyer, Gary Snyder. Mr. Snyder stated that Sulinna Jeong had agreed that Conkle would return to work with a 25 pound weight lifting limit. Although Conkle had not yet received a doctor's medical release stating that she could return to work at this time, she

assumed that she could go back to work as a grocery checker with no modification of duties.

On December 18, 1992, Sandra Twohy ("Twohy"), a Local 1179 representative, called Conkle to tell her that Laird's had been sold, and that all union employees would be laid off by December 28, 1992. Local 1179 questions the "sale" of Laird's because Sulinna Jeong had "sold" Laird's to Jadelin Corporation, a California corporation formed between her children, Baldwin and Jade Jeong, for the sole purpose of purchasing Laird's. Local 1179 believed that the "sale" was, in effect, a repudiation of the collective bargaining agreement between Laird's and Local 1179.

In response to the alleged repudiation of the union contract, Local 1179 filed a grievance under its collective bargaining agreement with Laird's to prevent the termination of Laird's union employees. Local 1179, through attorney David Rosenfeld, demanded that Laird's arbitrate Local 1179's grievance and threatened to compel arbitration through a federal court action. Moreover, on March 5, 1993, Local 1179 filed an unfair labor practice charge with the National Labor Relations Board, alleging that Laird's had refused to bargain with Local 1179 and had discriminated against its union employees.

Laird's refused to submit the grievance to arbitration. The union members at Laird's feared that they would permanently lose their jobs. Specifically, Conkle was concerned that Laird's would not recognize the union contract. Consequently, Local 1179 began picketing on February 16, 1993. The object of the picketers was to return

to their jobs under the same union contract that was in effect before the dispute. Picketing continued for a total of seventeen days.

On March 10, 1993, Local 1179 settled its labor dispute with Laird's new owner, Baldwin Jeong. He agreed to be bound by the 1992-1995 Master Food Agreement and, in return, Local 1179 waived its claims for back pay for the period of December 28, 1992 through March 10, 1993. Additionally, Local 1179 agreed to withdraw all pending grievances and withdraw the unfair labor practice charge filed with the National Labor Relations Board.

At the outset of the negotiations, Baldwin Jeong made it clear the he was reluctant to put Conkle back to work. Local 1179 representatives, Philip Carney ("Carney") and Twohy, told Baldwin Jeong that he would (1163) have to put Conkle back to work, so long as she provide a full medical release.

On March 11, 1993, Conkle met with Baldwin Jeong. At the meeting, he gave her a written job description which required that she be able to lift boxes up to 50 pounds, stock shelves, and stand for a period of two hours at a time.

On March 19, 1993, Conkle obtained a "qualified" medical release from Dr. Slauson. The release states that Conkle is able to do any work "which does not require prolonged bending, stooping or squatting." Moreover, Conkle "is able to lift articles up to [twenty-five pounds] if she is not required to bend over to lift them." The release further provides that Conkle "should not stand without

moving for longer than an hour in any 4 hour period." Conkle admits that she was surprised to learn that Dr. Slauson had restricted her from standing for longer than one hour in a four hour period. Prior to receiving Dr. Slauson's release, Conkle has been under the impression that she could stand for longer than one hour within a four hour period.

By letter dated March 21, 1993, Conkle informed Local 1179 that Baldwin Jeong had written her a note stating: 'because of [Conkle's] past and present medical conditions, [she] did not meet the requirements of employment at his firm." Conkle requested Local 1179 to "please advise [her] of the union position on this matter A.S.A.P." By letter dated March 24, 1993, Conkle's attorney questioned: "what, if any thing, local 1179 intend[ed] to do in response to Sheila Conkle's [sic] of 3/21/93 in response to the discriminatory practices of Laird's Food Markets."

On March 30, 1993, Local 1179's counsel responded with a letter stating: "Ms. Conkle's medical certificates indicate she cannot perform the duties required her. There is no basis to conclude that the employer's job requirements are inappropriate, unrelated to the actual duties or applied discriminatorily. Moreover, it does not appear that even with reasonable accommodation, Ms. Conkle could perform the essential duties of the job." The letter concluded as follows: "If there is further information which would cause the Union to re-evaluate its position, please bring it to our attention. Otherwise, the Union is not in a position to proceed further in this matter."

Neither Conkle nor her attorney responded to Local 1179's letter of March 30, 1993. In fact, the next time Local 1179 heard from Conkle was June 30, 1993, the date this action was filed. [1]

Conkle's complaint includes three claims for relief: (1) a § 301 claim against both her union, Local 1179 (for breach of its statutory duty of fair representation), and her employer, Laird's Food (for termination without "just cause" in violation of the collective bargaining agreement); (2) slander against Baldwin Jeong; and (3) intentional interference with prospective economic advantage against Baldwin Jeong.

Defendant's now move for summary judgment pursuant to FRCP 56 on each cause of action. Having reviewed the papers submitted and the arguments of counsel at the hearing on April 15, 1994, the court hereby: (1) **GRANTS** defendant's motion on count one for violation of § 301 of the Labor Management Relations Act; (2) **GRANTS** defendant Baldwin Jeong's motion on count two for slander; and (3) **GRANTS** defendant Baldwin Jeong's motion on

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[1]Although Conkle contends that there are additional facts relevant to this action, there is no substantial dispute with respect to the foregoing fact. Nevertheless, in instances in which Conkle's additional facts are relevant to the arguments discussed, the court has fully addressed and considered such facts in ruling on defendant's motion for summary judgment.

count three for intentional interference with prospective economic advantage.

I

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FRCP 56; *British Airways Board v. Boeing, Co.*, 585.2d 946, 951 (9th Cir.1978). The burden on the non-moving party is as follows:

> When a motion for summary judgment is made and supported a provided in this (1164) rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgement, if appropriate, shall be entered against the adverse party.

FRCP 56(e).

If defendant is the moving party, he sustains his burden by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Once the moving party makes such a showing, the burden shifts to the non-moving party to go beyond the pleadings and "designate specific facts showing the there is a genuine issue for trial." *Id* at 324, 106 S.Ct. at 2553. The non-moving party must do more "than simply

show that there is some metaphysical doubt as to material facts * * *." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment is proper. *Id.*

II

In count one of her complaint[2], Conkle alleges that the union breached its statutory duty of fair representation during the labor dispute of December 24, 1992 through March 10, 1993, by not doing enough to support her and her fellow union members. Specifically, Conkle complains that Local 1179 should have: (1) provided paid picketers; (2) publicized the dispute more widely: (3) provided higher-quality picket signs; (4) had its business agents spend more time on the picket line; and (5) allowed picketers to air their complaints before the Union's Executive Board. Even assuming that Local 1179 failed to provide or permit all of the above, Local 1179 correctly states that "federal law does not mandate how unions must allocate their resources in labor disputes."

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[2] In count one of her complaint, Conkle alleges that Local 1179 violated its statutory duty of fair representation in a number of ways. Nevertheless, each factual allegation is dealt with individually for purposes of clarity.

A union's duty of fair representation is inferred from the union's exclusive authority under the National Labor Relations act, 29 USC § 159(a), to represent all employees in a bargaining unit. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry,* 494 S.S. 558, 563, 110 S.Ct. 1339, 1343, 108 L.Ed.2d 519 (1990). In *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the Supreme Court defined the duty of fair representation:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. at 177, 87 S.Ct. at 910. The union's duty of fair representation extends to its conduct in negotiating collective bargaining agreements as well as in pursuing grievances on behalf of individual employees. *Bautista v. Pan American World Airlines, Inc.,* 828 F.2d 546, 549 (9th Cir.1987)

In the context of representing its members at the bargaining table, a union must be allowed a "'wide range of reasonableness' because it must be able to focus on the needs of it membership as a whole without undue fear of lawsuits from individuals members disgruntled by the result of the collective [bargaining] process." *Bautista,* 828 F.2d at 549. The union has the "discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, [it] believe[s] will best serve the interests of the parties represented." *Ford Motor Co. v. Huffman,* 345, U.S. 330, 337-38, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1952). The "complete satisfaction of all who are represented is

hardly to be expected." (1165) *Huffman,* 345 U.S. at 338, 73 S.Ct. at 686. Accordingly, a union breaches its statutory duty of fair representation *only* when its conduct toward a member of the collective bargaining unit is *"arbitrary, discriminatory or in bad faith." Vaca,* 386, U.S. at 190, 87 S.Ct. at 916 (emphasis added).

In this case, Local 1179 took a number of steps in its attempts to resolve the labor dispute with Laird's. In response to the repudiation of the union contract at Laird's, Local 1179 immediately filed a grievance under the collective bargaining agreement with Laird's to prevent the termination of Laird's union employees. Carney Declaration at ¶ 6 and Exhibit C thereto. Subsequently, after receiving what it considered inadequate responses from Laird's, Local 1179, through attorney Rosenfeld, demanded that Laird's arbitrate the union's grievance and threatened to compel arbitration through a federal court action. Rosenfeld Declaration at ¶ 4 and Exhibit B thereto. Because Laird's refused to submit the Unions grievance to arbitration, the union began picketing Laird's on February 16, 1993. The picketing continued for a total of seventeen days. On March 5, 1993, the union filed an unfair labor practice charge with the National Labor Relations Board alleging that Laird's had refused to bargain with the union and had discriminated against its union employees.

On March 10, 1993, the union settled the labor dispute with Laird's. The new owners, Baldwin and Jade Jeong, agreed to be bound by the 1992-1995 Master Food Agreement, the same contract that had bound Laird's before the change in ownership. In her deposition, Conkle admitted

that the application of this Master Food Agreement was exactly for what the picketers were fighting.

Based on the above, the court finds that no reasonable trier of fact could conclude that Local 1179's actions fell outside the "wide range of reasonableness" afforded unions in resolving labor disputes. Because Conkle has failed to provide *any evidence* to demonstrate that there is a triable issue of fact whether the union acted "arbitrarily, discriminatorily or in bad faith" in resolving the labor dispute, Local 1179's motion for summary judgment on the issue whether it violated its statutory duty of fair representation by not doing enough to support Conkle and her fellow members during the labor dispute is hereby **GRANTED.**

III

In count one of her complaint, Conkle also alleges that Local 1179 improperly withdrew all pending grievances and improperly waived its claim for back pay for the ten week of the labor dispute. Local 1179 argues that these concessions were reasonable under the circumstances for three reasons. First, the union faced a substantial risk of defeat if it continued to fight for back pay as a term of the labor dispute settlement. Second, even if the union would have prevailed in a civil action to compel arbitration or a National Labor Relations Board proceeding, the union members would have faced "a probable delay of several years before recovering any relief." Finally the unions decision to waive back pay and all pending grievances was a strategic decision in light of the fact that it was "better to

resume a normal relationship with Laird's under the union contract than to drive the small market out of business permanently."

Based on the above, the court finds that the union has sustained its burden of demonstration that no reasonable trier of fact could conclude that Local 1179's actions fell outside the "wide range of reasonableness" afforded unions in settling labor disputes and in negotiating collective bargaining agreements. Consequently, Conkle was required to put forth evidence creating a triable issue of fact whether Local 1179's actions were "arbitrary, discriminatory or in bad faith." Conkle did not address this issue, much less sustain her burden in response to the motion. Accordingly, Local 1179's motion for summary judgment on plaintiff's claim for violation of the duty of fair representation with respect to the labor dispute and the contract negotiation is hereby **GRANTED.**[3] (1166)

IV

In count one of her complaint, Conkle also alleges that Local 1179 violated its duty of fair representation by "conniving with management to exclude her as an employee at the market" by suggesting that Laird's require a full

[3] Because Local 1179's decision to withdraw all pending grievances fell within the "wide range of reasonableness" afforded unions in such circumstances, any claim Conkle had against Laird's prior to the settling of the labor dispute is now moot.

medical release before permitting her to resume working. Local 1179 argues, however, that its suggestion that Laird's require Conkle to provide a full medical release was reasonable under the circumstances and, therefore, it is entitled to judgment as a matter of law.

During the contract negotiations, Baldwin Jeong initially displayed reluctance in putting Conkle back to work. Nevertheless, Local 1179's president, Philip Carney, admonished Baldwin Jeong that "the negotiations would be over right there unless *all union members* were taken back." Carney declaration at ¶ 9 (emphasis added). Carney stated that Baldwin Jeong "would have to put Conkle back to work, so long as she provided a full medical release." Carney Declaration at ¶9; Twohy Declaration at ¶4. Baldwin Jeong found this acceptable. Accordingly, on march 10, 1993, Local 1179 and Baldwin Jeong agreed that each would sign the Master Food Agreement, effective March 1, 1993, and reinstate all union employees, specifically Conkle, with full seniority. Carney Declaration at ¶9 and Exhibit E thereto.

Based on the above, the court finds that no reasonable trier of fact could conclude that Local 1179's actions were not reasonable under the circumstances. Conkle fails to realize that Local 1179 is the exclusive bargaining representative for *all of its members,* not just her. Local 1179's primary goal was to secure a contract on behalf of the union members as a group, not to worry about the specific concerns of each individual member. When faced with the reality that the negotiations would break down if Laird's refused to take Conkle back, Local 1179 proposed a viable solution, thereby saving the negotiations. Because Local

1179's actions were reasonable under the circumstances, Conkle must provide evidence to create a triable issue of face whether Local 1179 acted "arbitrarily, discriminatorily or in bad faith."

In her attempt to demonstrate that Local 1179 acted "arbitrarily, discriminatorily or in bad faith," Conkle makes vague allegations that the "leadership of Local 1179 has long been known to 'reward their friends and punish their enemies.'" Even assuming that this is true, it is irrelevant with respect to whether Local 1179 acted "arbitrarily, discriminatorily or in bad faith" *toward her.*

Conkle attempts to show that Local 1179 acted in "bad faith" *toward her* by providing evidence that "on March 9, the day before the negotiation, [the union was informed] that [Conkle] had been out on disability and could not lift 25 pounds and, therefore, couldn't go back to work." Hooy Declaration ¶ 13 and Exhibit I thereto. Nevertheless, Conkle has merely demonstrated that Local 1179 was aware of the fact that she had suffered a back injury which had restricted her physical activity. Clearly, this was not the first time Conkle's back injury was brought to Local 1179's attention, as Conkle had been on leave for quite some time.

Moreover, Conkle has admitted that prior to her injury, her job required the she lift cases of liquor "between 55 and 60 pounds." Anderson Declaration and Exhibit J thereto. Because Local 1179 wanted to assure Baldwin Jeong that Conkle could assume the same work responsibilities upon returning to work, it recommended that Baldwin Jeong require Conkle to provide a full medical release. The court

cannot perceive how a reasonable trier of fact could conclude that such a recommendation was discriminatory or in bad faith toward Conkle.

Based on the above, the court concludes that Conkle has failed to sustain her burden of demonstrating that there is a triable issue of fact whether Local 1179 acted "arbitrarily, discriminatorily or in bad faith" toward her. Accordingly, Local 1179's motion for summary judgment on the claim that it violated its statutory duty of fair representation by suggesting that she obtain a "full medical release" before returning to work is hereby **GRANTED.**

V

In count one on her complaint, Conkle also alleges a §301 claim against her employer (1167), Laird's Foods, for terminating her without "Just cause" in violation of the Master Food Agreement. Additionally, Conkle alleges that Local 1179 breached its statutory duty of fair representation by failing to pursue her grievance against her employers when her employers declined to put her back to work because she was not physically able to perform her job.

An employee may bring a wrongful discharge action under §301 of the Labor Management Relations Act against his employer as the sole defendant, or he may also join his union as a defendant by alleging that the union breached its duty of fair representation. *Ness v. Safeway Stores, Inc.*, 598 F.2d 558, 560 (9th Cir.1979). Nevertheless, to prevail against either the company or the Union, a union member must not only show that his discharge was contrary to the collective bargaining agreement, but must also show that the

union violated its statutory duty of fair representation. *Hines v. Anchor Motor Frieght,* 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231 (1976). Accordingly, the threshold issue governing the liability of both parties on this claim is whether the union's conduct in handling Conkle's grievance was in breach of its statutory duty of fair representation.

In the grievance context, a union breaches its statutory duty of fair representation if it ignores a meritorious grievance or processes it in a perfunctory manner. *Vaca,* 386 U.S. at 191, 87 S.Ct. at 917. Nevertheless, the union is accorded great latitude in the handling of employee grievances. *Ness,* 598 F.2d at 560. Unless the union demonstrates a reckless disregard for the rights of the individual employee in handling employee grievances, the courts are hesitant to interfere with the union's decision. *Id.*

An employee who alleges a violation of the collective bargaining agreement between his union and the employer, must exhaust the grievance and arbitration procedures before bringing suit under § 301. *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652-53, 85 S.Ct. 614, 616-17, 13 L.Ed.2d 580 (1965). In most instances, a failure to utilize the grievance procedures, bars grievants from pursuing their remedies in court. *Id.* at 652, 85 S.Ct. at 616.

In this case, Local 1179 contends that Conkle "never filed any formal grievance required by section 18.2 of the union contract, Ex.2 to Carney Dec., even though she had her own copy of the contract, Conkle Dep. at 15:21-16:3, and legal counsel to assist her." She merely had her attorney

inquire, by letter dated March 24, 1993, "what, it anything Local 1179 intend[ed] to do * * * in response to the discriminatory practices of Laird's Food Markets." Carney Declaration and Exhibit F thereto. On March 30, 1993, Local 1179's counsel responded with a letter stating: "[b]ased on the facts known to the Union * * * it does not appear that even with reasonable accommodation, Ms. Conkle could perform the essential duties of the job." Carney Declaration ¶ 15 and Exhibit I thereto. Moreover, the letter specifically stated that "[i]f there is further information which would cause the Union to re-evaluate its position, please bring it to our attention. Otherwise, the Union is not in a position to proceed further in this matter." Id.

Even assuming that the March 24, 1993 letter from Conkle's counsel qualifies as a grievance, Conkle and her counsel neither responded to Local 1179's letter, nor communicated with the union before filing suit. Local 1179 correctly states that "[t]he most basic principle of fair-representation law is that a member may not boycott the grievance procedure, and then complain that the union has failed to vindicate her rights." *See Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652, 85 S.Ct. 614, 616, 13 L.ed.2d 580 (1965). Local 1179 persuasively argues that conkle should not be permitted to "hide the ball' by refusing to give [Local 1179] information establishing her grievance, and then sue [Local 1179] for failing to uncover that information independently."

Conkle contends that her failure to exhaust the grievance and arbitration procedures is excused because it would have been futile. Although an employee's failure to

exhaust *may* be excused when "the union's breach of [its] duty of fair representation *prevent[s]* [the plaintiff] from" doing so, *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir 1983) (emphasis added), (1168) case law makes it clear that the same does not apply here.

In an employee action against a union for breach of its statutory duty of fair representation, plaintiffs alleged that their failure to exhaust should be excused as futile because the alleged past misconduct of union officials had discouraged them from seeking the union's assistance after they were terminated. *Garcia v. Hudson Lumber Co.*, 679 F.Supp. 961, 965 (N.D.Cal.1987). The court stated, however, that past union misconduct does not excuse an employee's failure to exhaust the grievance and arbitration procedures. *Id.* An employee's failure to exhaust will be excused *only when* the employee can show that the union's breach of its statutory duty of fair representation *prevented* him from processing his grievance. *Id.*

In this case, Conkle concedes her failure to exhaust the grievance and arbitration process. She contends, however, that her failure to exhaust is excused because it would have been futile. Nevertheless, she has failed to provide any evidence showing that there is a triable issue of fact whether Local 1179 *prevented* her from pursuing the grievance and arbitration process. Conkle has merely demonstrated that she felt some animosity from various Local 1179 members and executives. Because this is insufficient to excuse her failure to exhaust, the court concludes that Conkle may not pursue her contractual remedies in this court. Accordingly, Local 1179's motion for summary

judgment on the claim that it violated its statutory duty of fair representation by failing to pursue Conkle's grievance is hereby **GRANTED.**

VI

Because a plaintiff cannot proceed against his employer under § 301 without first establishing a breach of the duty of fair representation by his union, defendant's motion for summary judgment on Conkle's § 301 claim against her employer is hereby **GRANTED.**

VII

In her second claim for relief, Conkle alleges that defendant Baldwin Jeong uttered false and unprivileged publications regarding her to separate telephone callers who, in consultation with Conkle, falsely identified themselves to Baldwin Jeong as prospective employers of Conkle seeking to verify her employment. Specifically, Conkle alleges that Baldwin Jeong "uttered statements about [her] to third parties, including prospective employers, to the effect:

> (a) that while [Conkle] worked at the market she acted like she thought she was management, knew everything and was difficult as an employee; (b) that [Conkle} led a strike against the market, but her own Union turned against her because she was too radical; (c) that there were many customer complaints about [Conkle], some saying they would rather stand in another cashier's line for two hours, rather than be

> waited on by [her]; (d) [sic] and that [Conkle] is more trouble than she is worth."

Complaint ¶24. Baldwin Jeong argues that summary judgment should be granted because the statements were: (1) truthful; (2) statements of opinion; and (3) protected under a qualified privilege. Although any one of these arguments is dispositive, each is addressed below.

Slander is defined as "a false and unprivileged publication," uttered orally, which tends directly to injure the subject in respect to his office, profession, trade or business. Cal.Civ.Code § 46 (West 1982). The truth of the statement is a complete defense, "regardless of the bad faith or malicious purpose of the publisher of the material." *Swaffield v. Universal Ecsco Corp.*, 271 Cal.App.2d 147, 76 Cal.Rptr. 680, 690 (1969).

In this case, it is undisputed that Conkle was never a management employee at Laird's, yet she admitted that she performed management duties and acted accordingly. Additionally, it is undisputed that Conkle lead the strike against Laird's and that she believes her own union turned against her, as evidenced by her veritable potpourri of claims against Local 1179 for breach of its duty of fair representation. Conkle Deposition 536: 8-10. Finally, it is undisputed that Laird's received customer complaints regarding Conkle. Declaration of Baldwin Jeong (1169) ¶10. (1169) In fact, one customer stated that he "found Sheila Conkle to be so unpleasant that when [he] went into the store,[he] would go to another check-stand to avoid her." Declaration of Baldwin Jeong ¶10 and Exhibit B thereto.

Because Baldwin Jeong has sustained his burden of showing that the above statements are true, the court concludes that such statements are not actionable.

Furthermore, Baldwin Jeong contends that even is the above statements are not true, the statements at issue are not actionable because they are statements of opinion. The essential inquiry in a defamation action is whether a "reasonable fact finder could conclude that the published statements imply a provably false factual assertion." *Moyer v. Amador Valley Joint Union High School District,* 225 Cal.App.3d 720,275 Cal.Rptr. 494, 497 (1990). The determination of whether a statement implies a provably false factual assertion is a question of law. *Id.*

For example, the statement that "Mr. Moyer (a teacher) is * * * the worst teacher at FHS" was found to be non-actionable opinion because it was not capable of being proven true or false. Id. Additionally, the statement: "I think someone is being bought on the Planning Commission, otherwise, how could you explain a 3-3 vote at one meeting on an issue and then at the very next meeting, a 6-1 vote?" was found to be non-actionable opinion. *Carr v. Warden,* 159 Cal. App.3d 1166, 1168, 206 Cal.Rptr. 162, 163 (1984).

Applying the foregoing standard, the court concludes as a matter law that Baldwin Joeng's statements that Conkle "acted like she thought she was management," "was too radical," "was difficult as an employee," and "is more trouble than she is worth" are statements of opinion because they do not imply a provably false factual assertion.

Accordingly, such statements are not actionable.

Finally, Baldwin Jeong contends that even if the above statements are actionable either because they are false or because they are statements of fact, the statements are not actionable because each is protected by a qualified privilege. California Civil Code § 47(c) provides in pertinent part: "A privileged communication is one made * * * without malice, to a person interested therein * * * by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or * * * [by one] who is requested by the person interested to give the information." Cal.Civ.Code § 479c) (West 1984). Thus, where comments are made by a former employer to a prospective employer who requests information regarding the employee, the communication is presumed to be privileged. *Neal v. Gatlin,* 35 Cal.App.3d 871, 877, 111 Cal.Rptr. 117 (1973).

Here, Baldwin Jeong's statements were made to two separate individuals who stated that they were prospective employers calling to verify Conkle's employment with Laird's and to request a candid appraisal of her job performance. Because these statements are presumed to be privileged, Conkle has the burden to prove that the statements were made with actual malice so as to defeat the privilege. *Williams v. Taylor,* 129 Cal.App.3d 745, 752, 181 Cal.Rptr. 423 (1982). Specifically, Conkle must create a triable issue of fact whether the statements were made with *actual malice, i.e.,* "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person." *Agarwal v. Johnson,* 25 Cal.ed 932, 944,

160 Cal.Rptr. 141, 603 P.2d 58 (1979).

In her attempts to demonstrate that Baldwin Jeong made the above statements with actual malice, Conkle states that she "infers" malice from Baldwin Jeong's statement to Carney that he "didn't want [her] back as an employee." Nevertheless, this statement has no bearing on whether Baldwin Jeong acted with "actual malice" when making the statements at issue with respect to Conkle's claim for slander. This merely demonstrates that Baldwin Jeong did not want to take Conkle back. Although the law requires employers to take employees back under such circumstances, the law cannot compel employers to do so happily. (1170)

Moreover, Conkle argues that the substance of the telephone conversations at issue demonstrates that Baldwin Jeong acted with "actual malice." The court, however, disagrees. The substance of the conversations does not create a triable issue of fact whether Baldwin Jeong acted with any "hatred or ill will" toward Conkle. The substance of the conversations merely demonstrates that Baldwin Jeong provided candid responses to the questions asked by the callers; it shows nothing with respect to Baldwin Jeong's state of mind. Consequently, the court concludes that Conkle has failed to provide evidence demonstrating that there is a triable issue of fact whether Baldwin Jeong's statements were made with the "actual malice" necessary to overcome the qualified privilege.

Based on the above, the court concludes that the statements by Baldwin Jeong are not actionable because they are either true or statements of opinion. Nevertheless, even

assuming that the statements are actionable because they are either false or statements of facts, the court finds that Conkle has failed to create a triable of fact whether the statements were made with actual malice. Accordingly, Baldwin Jeong's motion for summary judgment on the slander claim is hereby **GRANTED.**

VII

Conkle's third claim for relief is for intentional interference with prospective economic advantage. Specifically, Conkle contends that Baldwin Jeong uttered statements to "prospective employers * * * with intent to prevent [her] from obtaining employment."

The elements of a claim for intentional interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by acts of the defendant." Blank v. Kirwan, 39 Cal.3d 311, 330, 216 Cal.Rptr. 718, 703 P.2d 58 (1985).

In this case, Baldwin Jeong has sustained his burden of demonstrating that there is an absence of evidence to support Conkle's claim for intentional interference with prospective economic advantage. Conkle has not identified any relationship between herself and a third party containing

a probability of future economic benefits. Conkle claims that she had an expected job at Safeway. Nevertheless, she has failed to provide any evidence on this issue; speculation is not enough. Moreover, Conkle claims that her expected job with Safeway "mysteriously evaporated," after Baldwin Jeong provided false information about her in response to an inquiry by Safeway. Conkle has failed to provide any evidence that Safeway contacted Baldwin Jeong, much less that he made disparaging remarks about her. Because Conkle has failed to provide any evidence in support of her claim for intentional interference with prospective economic advantage, Baldwin Jeong's motion for summary judgment on this claim is hereby **GRANTED.**

IT IS SO ORDERED.

APPENDIX - 2

Sheila CONKLE, Plaintiff-Appellant,

v.

Sulinna JEONG, d/b/a Laird's Food Market; Baldwin Jeong; Local 1179, United Food and Commercial Workers International, et al., Defendants-Appellees.

No. 94-16012.

Cite as 73 F.3d 909 (9th Cir. 1995)

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 15, 1995.
Decided Dec. 27, 1995.

Before: CHOY, WIGGINS, and LEAVY, Circuit Judges.

CHOY, Circuit Judge:

Appellant Sheila Conkle ("Conkle") appeals the summary judgment for defendants in her action against her former employers and union for breach of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for slander and for intentional interference with prospective economic advantage. We affirm.

I. Factual and Procedural Background

Conkle began working at Laird's Market ("Laird's") on September 30, 1976, and subsequently joined United Food and Commercial Workers Union, Local 1179 ("Local 1179" or "the union"). Conkle worked as a "liquor clerk" until 1990, when the union pressured Laird's to reclassify her as a higher-paid "grocery clerk." Her duties involved checking groceries for customers and occasional light lifting. Conkle alleges that Laird's had an unwritten policy of allowing female employees to refuse to lift items and instead ask male employees for help.

After reclassification, Conkle had to perform more heavy lifting, which resulted in a back injury on November 5, 1991. Conkle's family practitioner, Dr. Dana Slauson, allowed Conkle to return to work on condition that she refrain from lifting. On November 8, 1991, the last day that Conkle worked at Laird's, the owner of Laird's, Sulinna Jeong, decided that Conkle could not work.

On December 9, 1992, Conkle's worker's compensation lawyer told her that Sulinna Jeong had agreed that Conkle could return to work with a twenty-five pound weight lifting limit. although Conkle had not yet received a doctor's medical release, she believed that she could return to work as a grocery checker with no modification of duties.

On December 18, 1992, Sandra Twohy ("Twohy"), a Local 1179 representative, told Conkle that Sulinna Jeong had "sold" Laird's to Jadelin Enterprises, Inc., a California corporation formed between her children, Baldwin and Jade

Jeong, for the sole purpose of purchasing Laird's. Laird's would lay off all union employees by December 28, 1992. Local 1179 believed that the "sale" was, in effect, a repudiation of the collective bargaining agreement.

In response, Local 1179 filed a grievance under its collective bargaining agreement to prevent the termination of Laird's union employees. On March 5, 1993, Local 1179 filed an unfair labor practice charge with the national Labor Relations Board ("NLRB"), alleging that Laird's had refused to bargain with Local 1179 and had discriminated against its union employees. Picketing began on February 16, 1993 and continued for seventeen days. On March 10, 1993, Local 1179 settled its labor dispute with one of Laird's new owners, Baldwin Jeong. He agreed to be bound by the 1992-1995 Master Food Agreement and, in return, Local 1179 waived its claims for back pay for the period of December 28, 1992 through March 10, 1993 and withdrew all pending grievances.

At the outset of the negotiations, Baldwin Jeong indicated his reluctance to rehire Conkle. Local 1179 representatives Phil Carney ("Carney") and Twohy told Baldwin Jeong that he would have to rehire Conkle, so long as she provided a full medical release. On March 11, 1993, Baldwin Jeong gave Conkle a written job description which required that she be able to lift boxes up to fifty pounds, stock shelves, and stand for two hours at a time.

On March 19, 1993, Conkle obtained a "qualified" medical release from Dr. Slauson. The release states that Conkle can perform any work "which does not require

prolonged bending, stooping or squatting." Moreover, Conkle "is able to lift articles up to [twenty-five pounds] if she is not required to bend over to lift them." Furthermore, Conkle "should not stand without moving for longer than an hour in any 4 hour period."

In a March 21, 1993 letter, Conkle informed Local 1179 that Baldwin Jeong had written her that "because of [Conkle's] past and present medical conditions, [she] did not (914) meet the requirements of employment at his firm." Conkle requested Local 1179 to "please advise [her] of the union position on this matter A.S.A.P." In a March 24, 1993 letter to Local 1179, Conkle's attorney questioned "what, if anything, Local 1179 intend[ed] to do in response to Sheila Conkle's [sic] of 3/21/93 in response to the discriminatory practices of Laird's Food Markets."

In a March 30, 1993 letter, Local 1179's counsel responded:

> Ms. Conkle's medical certificates indicate she cannot perform the duties required of her. There is no basis to conclude that the employer's job requirements are inappropriate, unrelated to the actual duties or applied discriminatorily. Moreover, it does not appear that even with reasonable accommodation Ms. Conkle could perform the essential duties of the job.

The letter concluded: "If there if further information which would cause the Union to re-evaluate its position, please bring it to our attention. Otherwise, the Union is not in a position to proceed further in this matter." Neither Conkle nor her attorney responded to the March 30 letter. The next

time Local 1179 heard from Conkle was June 30, 1993, the date this action was filed.

Conkle's complaint includes three claims for relief: (1) a § 301 claim against Local 1179 for breach of its statutory duty of fair representation ("DFR") and against Sulinna Jeong and Jadelin Enterprises, Inc. (collectively "Employer") for the termination without just cause in violation of the collective bargaining agreement; (2) slander against Baldwin Jeong and Employer; and (3) intentional interference with prospective economic advantage against Baldwin Jeong and Employer. The district court granted summary judgment to all defendants on all claims on May 2, 1994. *Conkle v. Jeong,* 853 F.Supp. 1160 (N.D.Cal.1994).

II. Analysis

A. The district court did not abuse its discretion in denying Conkle's request to conduct further discovery before ruling on the summary judgment motions.

We review a district court's denial of a request for further discovery by a party opposing summary judgment for abuse of discretion. *International Alliance of Theatrical and Stage Employees v. Compact Video Servs., Inc.,* 50 F.3d 1464, 1466 99th Cir.1995), *cert. denied,* ---U.S.---, 116 S.Ct. 514, 133 L.Ed.2d 423 (1995). Conkle argues that, under Rule 56(f), the district court should have allowed her to conduct further discovery before ruling on the summary judgment motions.

Assuming that Conkle properly requested Rule 56(f) relief, the district court had discretion to deny the relief.

"The burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that the evidence sought exists." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir.1987). Conkle has not met this burden. She seeks evidence regarding alleged conversations between Baldwin Jeong and potential employers, but fails to put forth any facts to show that such conversations took place.

Moreover, "[t]he district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past." *California Union Ins. Co. v. American Diversified Sav. Bank,* 914 F.2d 1271, 1278 (9th Cir.1990), *cert. denied,* 498 U.S. 1088, 111 S.Ct. 966, 112 L.Ed.2d 1052 (1991); *see also Qualls v. Blue Cross of California,* 22 F.3d 839, 844 (9th Cir.1994). Conkle argues that the district court's November 1993 oral order prevented her from deposing Safeway employees and Judy Cowell, but she never formally requested the court to amend this order. Indeed, Conkle's attorney drafted the stipulation closing discovery, including an exception to allow Conkle to conduct two depositions which had not been completed on time.

In addition, although Conkle's failure to formally request a Rule 56(f) continuance may not be fatal, "the absence of a formal request for a continuance is relevant to the question whether the district court abused its discretion by ruling on the motion when it did." *Bryant v. Ford Motor Co.,* 886 F.2d 1526, 1534 (9th Cir.1989), *cert.denied,* 493 (915) U.S. 1076, 110 S.Ct. 1126, 107 L.Ed.2d 1033 (1990)

given these factors, the district court did not abuse its discretion in denying Conkle's request for further discovery.

B. Local 1179 did not violate its DFR as to Conkle.

We review de novo a grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir.1994). "Specifically, whether a union's conduct amounted to a breach of the duty of fair representation presents a mixed question of law and fact that we review de novo." *Burkevich v. Air Line Pilots Ass'n, Int'l,* 894 F.2d 346,349 (9th Cir.1990).

Local 1179 asks us to give "considerable weight" to the NLRB's refusal to issue an unfair labor practice complaint against Local 1179, *Helmer v. Briody,* 747 F.Supp. 1020, 1026 (S.D.N.Y.1990), quoting *Berard v. General Motors Corp.,* 493 F.Supp. 1035, 1040 (D.Mass.), *aff'd,* 657 F.2d 261 91st Cir.1980), *cert. denied,* 451 U.S. 987, 101 S.Ct. 2322, 68 L.Ed.2d 845 (1981). In *Helmer* and *Berard,* however, the NLRB made express factual findings, which did not occur here. Moreover, "[t]he NLRB general counsel has unreviewable discretion to refuse to issue an unfair labor practice complaint, and plaintiffs were not afforded a hearing before the NLRB. Furthermore the courts, not the Board, have the responsibility for defining the scope of the duty of fair representation." *Smith v. Hussmann Refrigerator Co.,* 619 F.2d 1229, 1245 (8th Cir.), *cert. denied,* 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d 46 (1980). While we might give weight to express factual findings, we will not defer to a naked no-action decision.

Conkle alleges that Local 1179 violated its DFR in three ways. First, in her complaint she alleges that Local 1179 inadequately supported the strike and made unnecessary concessions to Laird's. Her opening brief, however, appears to abandon this argument. Even if not abandoned, the argument lacks strength. Federal law grants a union a "wide range of reasonableness" in representing its members. *Bautista v. Pan Am World Airlines, Inc.*, 828 F.2d 546, 549 (9th Cir.1987). A union breaches its DFR only when its conduct towards a member is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Local 1179's choice of litigation and picketing tactics, as well as its decision to cede some negotiating issues in order to retain union jobs and not pressure the financial viability of Laird's, was well within this wide range of reasonableness.

Second, Conkle alleges that Local 1179 connived with management to deny her reemployment by suggesting that Baldwin Jeong require a full medical release. Construing the evidence in the light most favorable to Conkle, her claim has some appeal. In his deposition, Baldwin Jeong stated that he knew nothing about a medical release before the union representatives mentioned it. His deposition also suggests that the union representatives first mentioned the medical release after the contract signing, indicating that the medical release was not a bargain necessary to save the negotiations, but rather a gratuitous concession. Indeed, Baldwin Jeong indicated his willingness to follow any union suggestion regarding Conkle: "I said, 'You're the union, tell me what I do from now on.' I listen to them, everything they say. I

said, 'You know the laws, you know the stuff,' so I just follow whatever they said and that's all I did."

This conduct, however, does not meet the standard of arbitrariness the Supreme Court outlined in *Air Line Pilots Ass'n, Int'l v. O'Neill,* 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). The Court held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Id.* at 67, 111 S.Ct. at 1130 (citation omitted). Baldwin Jeong directly asked the union representatives whether he had to rehire Conkle. While they could have told Jeong a misleading half-truth that he had to rehire her, they had several rationales for telling him about the medical release. A union representative is "entitled to decline to put forward an (916) interpretation of the collective bargaining agreement which he and his union reasonably [believe is] incorrect." *Early v. Eastern Transfer,* 699 F.2d 552, 557 (1st Cir.), *cert. denied,* 464 U.S. 824, 104 S.Ct. 93, 78 L.Ed.2d 100 (1983). Local 1179 reasonably believed that management could require a full medical release. In addition, a union has good reason to avoid souring relations by misleading a new manager who has just signed a new collective bargaining agreement. It was not irrational for the union representatives to answer honestly and fully Baldwin Jeong's inquiry about whether he had to rehire Conkle.

Nor did Local 1179 act in bad faith in suggesting the medical release. Conkle argues that the leaders of Local 1179 had a personal animus against Conkle over her role in

the strike, and knew the extent of her injury when the suggested the medical release. While the leaders of Local 1179 may have personally disliked Conkle, however, she provides no evidence that this alleged dislike, rather than the legitimate reasons noted above, motivated their decision to mention the full medical release. Conkle herself was surprised at the restrictions imposed in Dr. Slauson's qualified medical release, indicating that no one knew the extent of her injury before the medical release.

Third, Conkle alleges that Local 1179 failed to pursue her grievance diligently against Laird's for terminating her without "just cause" in violation of the Master Food Agreement. A union breaches its DFR if it ignores a meritorious grievance or processes it in a perfunctory manner. *Vaca v. Sipes,* 386 U.S. 171, 191, 87 S.Ct. 903, 917, 17 L.Ed.2d 842 (1967). A union's decision to pursue a grievance based on its merits or lack thereof is an exercise of its judgment. *Stevens v. Moore Business Forms, Inc.,* 18 F.3d 1443, 1447 (9th Cir.1994). A union's decision is arbitrary only if it lacks a rational basis. *Robesky v. Qantas Empire Airways Ltd.,* 573 F.2d 1082, 1089 (9th Cir. 1978).

Assuming that Conkle properly exhausted the grievance and arbitration procedures, Local 1179's rejection of her claim did not lack a rational basis. As its March 30, 1993 letter states,

> Ms. Conkle's medical certificates indicate she cannot perform the duties required of her. There is no basis to conclude that the employer's job requirements are inappropriate, unrelated to the actual duties or applied discriminatorily. Moreover, it does not appear that

even with reasonable accommodation, Ms. Conkle could perform the essential duties of the job.

Conkle does not dispute that Laird's physical requirements matched industry standards. Instead, she argues that the "common law of the shop" at Laird's allowed female employees to refuse any heavy lifting. Since her letters never informed Local 1179 of this policy, however, it was hardly irrational for the union to have overlooked it. Moreover, even if Local 1179 knew of the policy, it had no duty to advocate a policy which it reasonably believed would constitute sexual discrimination. *Cf. Early v. Eastern Transfer,* 699 F.2d 552, 557 91st Cir.1983), *cert. denied,* 464 U.S. 824, 104 S.Ct. 93, 78 L.Ed.2d 100 (1983). At most Local 1179 made "an error in evaluating the merits of a grievance," for which we have never held a union liable absent proof of discrimination or bad faith. *Peterson v. Kennedy,* 771 F.2d 1244, 1254 (9th Cir.1985), *cert. denied,* 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986).

Conkle thus must now show discrimination or bad faith. As noted above, however, the evidence of bad faith is too weak to survive summary judgment, and Conkle nowhere alleges discrimination. Given Local 1179's strong rationale for not pursuing Conkle's claim, no reasonable trier of fact could find that Local 1179 made its decision in bad faith.

C. Because Local 1179 did not breach its DFR, Conkle cannot pursue her § 301 claim against Employer.

Courts "should defer to the tribunal chosen by the

parties finally to settle their disputes." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). "Therefore, in order to proceed with a §301 suit against the employer, the employee must show not only that her discharge was contrary (917) to the agreement, but also must demonstrate that the union breached its duty of fair representation." *Schlacter-Jones v. General Tel.*, 936 F.2d 435, 442-43 (9th Cir. 1991). Because Local 1179 did not breach its DFR, Conkle cannot pursue her § 301 claim against Employer.

D. Conkle fails to establish a claim for slander.

We review a grant of summary judgement de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995). Conkle and her husband asked their friends Deborah DePatta and Charles Cain to telephone Baldwin Jeong and ask to "verify Conkle's employment." Conkle alleges that Jeong's statements to these callers constitute slander. Cal.Civ.Code §46.

Truth is a complete defense to slander, "regardless of the bad faith or malicious purpose of the publisher of the material." *Swaffield v. Universal Ecsco Corp.*, 271 Cal. App.2d 147, 76 Cal.Rptr. 680, 690 (1969). Conkle alleges that Baldwin Jeong made statements to the effect:

> (a) that while [Conkle] worked at the market she acted like she thought she was management, knew everything and was difficult as an employee; (b) that [Conkle] led a strike against the market, but her own Union turned against her because she was too radical; (c) that there were many customer complaints about

> [Conkle], some saying they would rather stand in another cashier's line for 2 hours, rather than be waited on by [her]; (d) [sic] and that [Conkle] is more trouble than she is worth.

Most of these statements are indisputably true. Conkle was never a management employee, yet she stated that she performed management duties and acted accordingly. Conkle led the strike against Laird's, and has stated that her union turned against her because she advocated a harder line against Laird's. Laird's received customer complaints about Conkle, including one by a customer who "found Sheila Conkle to be so unpleasant that when [he] went into the store, [he] would go to another checkstand to avoid her." These true statements are not actionable.

The other statements are not actionable because they are statements of opinion. An actionable statement must imply a provably false factual assertion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20, 110 S.Ct.2695, 2706-2707, 111 L.Ed.2d 1 (1990). For example, a statement that a certain teacher is "the worst teacher at FHS" is not actionable because it cannot be proven true or false. *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal.App.3d 720, 275 Cal.Rptr 494, 497 (1990). Likewise, the statements that Conkle was "difficult as an employee" and "more trouble than she [was] worth" are statements of opinion; they do not imply a provably false factual assertion.

Jeong also enjoys a qualified privilege as a former employer. "It is well established that a former employer may properly respond to an inquiry from a potential

employer concerning an individual's fitness for employment, and if it is not done maliciously such response is privileged." *Neal v. Gatlin,* 35 Cal.App.3d 871, 111 Cal. Rptr. 117, 121 (1973); Cal.Civ.Code §47(c). Although DePatta and Cain were not prospective employers, they implied to Jeong that they were, and did no under the instigation of Conkle and her husband. Jeong reasonable believed he was speaking to prospective employers, and should not lose his privilege through Conkle's subterfuge. Conkle must thus establish Jeong's malice. At worst, Jeong responded candidly to direct questions. The callers made the most derogatory statements ("She's a real trouble maker, huh?" and "She sounds like she's more trouble than she's worth"), to which Jeong merely assented. Moreover, Jeong volunteered positive information ("Well, she won't steal or anything like that"), and refrained from providing other negative information, namely that her injuries prevented her from clerking. The record simply does not reveal the malice needed to over come Jeong's qualified privilege. The district court properly granted summary judgment.[1]

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[1] Consent also constitutes an absolute privilege to the publication of defamatory matter. *Royer v. Steinberg,* 90 Cal.App.3d 490, 153 Cal.Rptr. 499, 503 (1979). "Where a defendant, not in the presence or hearing of third persons, makes a slanderous statement about a plaintiff, and thereafter, at the request of the plaintiff, repeats the statement in the presence and hearing of third persons, such repetition cannot be made the basis of an action for slander." *Pouchan v. Godeau,* 167 Cal. 692, 140 P. 952, 953 (1914). In *Royer,* a superintendent wrote an "open letter" to the

E. Conkle fails to establish a claim for intentional interference with prospective economic advantage.

We review a grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995). Conkle claims that Baldwin Jeong uttered statements to prospective employers intending to prevent her from obtaining employment. The elements of the tort of intentional interference with perspective economic advantage are:

> (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant.

Blank v. Kirwan, 39 Cal.3d 311, 216 Cal. Rptr. 718, 723, 703 P.2d 58, 70 (1985).

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community which "challenged" a school board to "prove" charges of improper election activities. *Royer v. Steinberg,* 153 Cal.Rptr. at 502. The court held that Royer had consented to the board's subsequent publication of its charges.

Conkle fails to satisfy these elements. She provided no evidence of an expected job at Safeway or elsewhere, or of any conversation between Jeong and any prospective employer. Safeway's decision not to hire Conkle, even viewed in the light most favorable to her, does not suffice to show that Jeong spoke to Safeway, much less made disparaging comments about her.

The judgment of the district court is AFFIRMED.

APPENDIX - 3

NOT FOR PUBLICATION
UNITED STATE COURT OF APPEALS,
FOR THE NINTH CIRCUIT

SHEILA CONKLE,	)
	)NO. 94-16012
Plaintiff,	)DC#CV-93-02443-VRW
	)
SULINNA JEONG, dba	)
LAIRD'S FOOD MARKET,	)
BALDWIN JEONG, JADELIN	)
LAIRD'S FOOD MARKET,	)
UNITED FOOD AND COMMER-	)
CIAL WORKER'S UNION,	)
LOCAL 1179 AFL-CIO,	)
	)
Defendants.	)

Before: CHOY, WIGGINS and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P). 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF SERVICE
BY MAIL

I hereby certify as follows:

I am an active member of the State Bar of California and am not a party to the above-entitled action. I am also admitted to practice before the Federal Court of the Northern District of California, the Ninth Circuit and the Supreme Court of the United States. My business address is 3125 Clayton Road, Second Floor, Concord, California 94519.

I served the attached:

PETITION FOR WRIT OF CERTIORARI

by depositing a true copy thereof in the United States Mail in Concord, California, on May 3, 1996, enclosed in a sealed envelope with the postage thereon fully prepaid, and addressed as follows:

STEVEN L. STEMERMAN, ESQ.
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THE HONORABLE JUSTICES CHOY, WIGGINS & LEAVEY
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
Post Office Box 193939
San Francisco, CA 94119-3939

THE HONORABLE VAUGH R. WALKER
U.S. DISTRICT COURT JUDGE
450 Golden Gate Avenue
San Francisco, CA 94102-3483

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: May 3, 1996.



WILLIAM J. HOOY